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Issue Date: 31 October 2003

In the Matter of:

THOMAS F. SZADA,
Claimant

Case No. 2002-LHC-573
OWCP No.: 06-179845

v.

IMC-Agrico MP, Inc.,
Employer

and

Travelers Workers' Comp,
Carrier

Appearances:

Anthony V. Cortese, Esq.
Tampa, Florida
For the Claimant

Amy V. Seemann, Esq.
Blue Williams, L.L.P.
Metairie, Louisiana
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by Claimant, Thomas Szada, against his Employer, IMC-Agrico MP, Inc. ("IMC") and its insurance Carrier, Travelers Insurance Company ("Travelers"). The Act provides for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. In this case, Mr. Szada alleges that he was totally, permanently disabled by an injury to his back and neck.

I conducted a hearing on this claim on June 11, 2002, in Orlando, Florida. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Joint Exhibit ("JX") 1; Claimant's Exhibits ("CX") 1-12, 14-16, and 19-24, and Employer's Exhibits ("EX") 1-3, 5-15 and 17, were admitted into evidence without objection. Transcript ("Tr.") at 34-35. CX 13, 17, 18 and 25 were admitted over the objection of the Employer. Tr. at 48, 166-167. EX 4 (pp. 1, 2 and 16 only, as pp. 3-15 were withdrawn), 16 and 18 were admitted over the objection of the Claimant. Tr. at 35, 125. The record was held open after the hearing to allow me to consider the Claimant's Motion to Exclude Testimony and Reports of Jim Edleston, the Employer/Carrier's vocational expert, which I denied by order dated July 25, 2002, and to allow the parties to submit closing arguments. The parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

STATEMENT OF THE CASE

Mr. Szada was employed by IMC for about 29 years. On June 5, 1999, he injured his back while trying to pin a shuttle on a gantry. He was referred for treatment which initially involved primarily his lower back. When he did not improve, he was referred to an orthopedist, who recommended surgery, a lumbar fusion. Mr. Szada was not a candidate for surgery due to other health problems, however, so he continued in conservative medical treatment. Eventually he sought treatment for his mid back, at first declined but later accepted by the Employer/Carrier, and then for his neck, which is now contested by the Employer/Carrier. He had returned to work at IMC on light duty, but was taken off work entirely on December 4, 2000, due to his work restrictions. He has been receiving temporary total disability compensation and medical expenses relating to treatment of his lumbar and thoracic spine.

Mr. Szada contends that his cervical problems are related to his June 5, 1999 work injury. He also contends that he is permanently, totally disabled. He seeks an award of medical expenses for treatment of his cervical problems, compensation for permanent total disability, attorney fees and costs. *See* the Claimant's Final Hearing Memorandum filed August 12, 2002.

IMC and Travelers maintain that the cervical injury is not related to the work injury. They also maintain that Mr. Szada's treating physician has released him to light duty, and that there is suitable alternate work he can perform. They also contend that Mr. Szada had not made diligent efforts to secure employment. *See* the Employer/Carrier's Post-Trial Memorandum filed August 8, 2002.

ISSUES

The issues before me are:

1. Whether Mr. Szada's cervical injury arose from his employment.

2. The extent of Mr. Szada's disability.

Claimant's Pre-Hearing Statement; Employer's Pre-Hearing Statement; Tr. at 28.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties were able to reach the following Stipulations:

1. The Claimant was injured on June 5, 1999, in Hillsborough County, Florida.

2. The injury occurred when the brakes on a shuttle weren't holding and he went back and forth from bypass trying to pin the shuttle in place.

3. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

4. An employer-employee relationship existed at the time of the injury.

5. The injury arose in the course and within the scope of his employment.

6. The Claimant gave timely notice of the injury to the Employer on June 5, 1999.

7. The Claimant filed a timely claim on June 5, 1999.

8. Whether the Employer filed a timely notice of controversion is at issue.[1]

9. The Employer filed a timely report of the accident on June 11, 1999.

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[1]Although the Claimant's Prehearing Statement indicated he was seeking penalties, the issue of penalties was not raised in his closing argument, and the record indicates that the Claimant has been receiving temporary total disability payments at the same rate he would receive permanent total disability compensation. Thus it appears no 14(e) penalty would be due. A copy of a Notice of Controversion dated May 30, 2001, is in the record as Exhibit 2 to the June 4, 2002, Deposition of Cheryl Becnel, Senior Claims Representative for Travelers, CX 10.

10. The injury resulted in disability.

11. Medical benefits under Section 7 of the Act have been paid to Dr. Castellvi, Dr. Dennison and COMBI.

12. Temporary total disability benefits have been paid at the rate of $544.83 per week since December 4, 2000.

13. Whether the Claimant has a permanent total disability is at issue.

14. Claimant's average weekly wage at the time of injury was $817.25, yielding a compensation rate of $544.83.

15. Based on the testimony of Dr. Castellvi at his deposition, the date of maximum medical improvement was June 15, 2000. *See* Tr. at 28-29, Deposition ("Dep.") (CX 2 and EX 17) at 19.

16. The Claimant has not returned to his regular employment since the injury.

17. IMC does not have a position available to the Claimant, i.e., neither the position that he held at the time he was injured, nor other positions that fall within his restrictions. *See* Tr. at 7.

All stipulations are found in JX 1 except for those referenced to the transcript.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. *See* 20 CFR § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

Summary of the Evidence

Mr. Szada testified at the hearing that he lives in Riverview, Florida. He has been married to his wife, Suzanne, for over 33 years. They have two grown children. Tr. at 37. He was employed by IMC for 29 years, and was still an employee in good standing at the time of the hearing. At the time of his injury, on June 5, 1999, he was employed as a gantry operator. A gantry is used to load an unload ships. Tr. at 39. A gantry is a boom with a conveyor belt. A telescope off the boom goes down in the hold of the ship. A shuttle on the boom sometimes has to be unpinned so the shuttle can go back and forth to spread cargo in the hold. Longshoremen control the shuttle with a pinup box. Tr. at 38. The gantry operator watches the longshoremen to

see if the gantry should be moved, and services the gantry, which requires climbing, crawling, and sometimes, going out to the end of the boom to pin the shuttle out. Tr. at 38-39. The gantry operator's cab is about two stories above the dock, reached by stairs. The whole plant depends on the gantry and must shut down if something goes wrong with it. Tr. at 39. According to the company position description, the position of gantry operator is medium work, requiring exerting up to 50 pounds of force occasionally, and/or 20 pounds frequently, and/or 10 pounds constantly to move objects; and requiring stooping, kneeling, crouching, reaching, walking and balancing. EX 2.

On the day of the injury, the brakes on the shuttle went out just as they were finishing up a ship. The shuttle weighs at least a couple of tons. Mr. Szada called the supervisor, who told him to pin it out. The longshoremen had to play with the switch on the pinup box to get the shuttle out, and then they left the ship. Mr. Szada pulled up the pinup box by rope. Then he left the control room, and climbed the ladder to the walk way to go out on the boom. There is a bypass switch on the boom to line the shuttle up to put the pin in, but he could not see the pin from the bypass switch because there were motors in the way. Every time he took his finger off the switches, the shuttle tried to travel on its own, and he would have to hold the switches to get it back. He had to get from the switch, over the motors, to stick the pin into the hole to hold the shuttle out. When he called for help, noone could hear him because the longshoremen had left the ship. He tried six or eight times to get the pin in. As he was trying to get the pin in, he felt a sharp pain all the way down his spine and left arm. He was not able to finish, and went to the control room to call the temporary supervisor, Gene Rhodes. Other employees had to finish the job. Tr. at 40-43.

At first he was referred to a nurse practitioner to treat his injury, and put on light duty. He reported for work, but was not given any work to do. Tr. at 49-50. Three or four months later he was sent to Dr. Castellvi, an orthopedist. Tr. at 50. He was having pain in his back, legs, between his shoulders and in his left arm. Dr. Castellvi gave him medication, and ordered MRI's for his shoulder and lower back. Dr. Castellvi recommended surgery for his lumbar area, but Mr. Szada was told he could not have the surgery because of his history of blood clots and pulmonary problems. Tr. at 51-52. Dr. Castellvi then referred Mr. Szada to Dr. Dennison for pain management. Dr. Dennison gave him epidural steroid injections for his lower back, and recommended injections for the cervical area, but they were not authorized. Tr. at 52-53; 72-73. He continued to report for light duty until December 4, 2000, when he was called in and told he was being taken off the payroll. While he was working light duty, he never refused anything he was asked to do. He tried unsuccessfully to bid into lighter duty jobs than gantry operator, including sample tower and locomotive engineer, which was one of the lightest jobs at IMC. Tr. at 59-60, 76-77, 80. He filed grievances when he did not get those jobs, feeling that he should have been given the opportunity to try them. Mr. Szada requested and received a release without restrictions in order to try to get the locomotive job, but later restrictions were reimposed. Tr. at 76-83. According to the vacancy announcements for the positions of sample tower operator and locomotive engineer, candidates must be physically qualified to perform strenuous activities. EX 2.

Mr. Szada testified that at the time of the injury, he was injured between his shoulders and his lower back. He thought the lower back was worse at the time of the injury, and still thought so at the time of the hearing. Surgery had been recommended for his lower back, but not for his cervical area. Tr. at 48. Mr. Szada was being treated by Dr. DiGeronimo for sleep apnea. He asked Dr. DiGeronimo about his cervical spine, because his neck was bothering him one day in his office. Tr. at 71-72. He submitted the bills from Dr. DiGeronimo to his health insurance. His health insurance carrier would not pay Dr. DiGeronimo's bills as they were considered related to workers' compensation. IMC did not recognize the cervical problem as part of his workers' compensation claim. Tr. at 53-56; *see* CX 23. He said he discussed his pain between his shoulder and his arm with Dr. Castellvi, but he could not say whether Dr. Castellvi ever treated him for any problems with his neck. Tr. at 72.

Before he was injured, Mr. Szada was being treated for his heart and lungs. His cardiologist told him to walk at least a mile three times a week. Since his injury he has not been able to walk, because it hurt, and caused him trouble with his legs. Dr. Castellvi put a restriction on walking. Tr. at 40, 56-57. He continues to receive treatment for his cardiac and pulmonary problems, as well as for his work injury. Tr. at 58. He said his lower back limits him from walking and working in the yard. Tr. at 63. He also has problems with his middle back, reaching or keeping his arms extended. His upper back gives him problems turning his head, and gives him pain at the side of his neck. Tr. at 64. His legs have a burning sensation and sensitivity, and his left arm has burning and numbness, affecting his use of his arm. Tr. at 64-65. He is also being treated by Dr. Camposano for arthritis in his hands. Tr. at 65. He had trouble performing a peg board test because of his hands. Tr. at 65-66. Evidence regarding his medical treatment is discussed separately below.

Mr. Szada has not worked since December 4, 2000. He received workers' compensation benefits after that, and was still receiving them at the time of the hearing. Tr. at 74. He is also receiving Social Security disability benefits.[2] Tr. at 87. He was not aware that Dr. Castellvi and Dr. Patterson had testified at their depositions that with respect to his spine, he could return to work with restrictions. Tr. at 75. He did not look for work outside of IMC after December 4, 2000, saying he was still employed by IMC and always hoped to go back there. Tr. at 83-84, 86. He did not apply for any of the jobs identified by the vocational counselors. Tr. at 84-85. He would not say whether he would look for work in the future. Tr. at 85. He requested and received a note from Dr. Dennison saying he was disabled about three weeks before the hearing when the issue of other jobs came up. Tr. at 89, 91, 97. It was his understanding that his future treatment would be provided by Dr. Dennison, and that he would not be seeing Dr. Castellvi again. Tr. at 99.

Mrs. Szada also testified at the hearing. She said that after the accident, Mr. Szada

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[2]Mr. Szada's award letter from the Social Security Administration was introduced into the record as CX 11. According to the letter, he became disabled under Social Security rules on December 4, 2000.

complained about pain all up and down his back, between his shoulders, and in his lower back and legs. Tr. at 102-103. She said he is not doing very many activities. She takes out the garbage and carries in the groceries, because it is difficult for him to pick up anything or to climb stairs. Tr. at 103. He is no longer doing his walking, and his health has gone down hill the past two years. Tr. at 104.

The Employer retained a vocational expert, James (Jim) Edleston, to perform a vocational assessment of Mr. Szada. Mr. Edleston prepared a report and was deposed, and also testified at the hearing. The Claimant also retained a vocational expert, Ricardo Estrada, who prepared a report and was deposed. Their reports and testimony are addressed in detail below in the discussion of suitable alternate employment.

Medical Evidence

Mr. Szada's family doctor is Dr. P. C. Camposano. Dr. Camposano's treatment records from May 1991 to April 2002 are found in CX 24. Over the years, Dr. Camposano has diagnosed Mr. Szada with pulmonary and cardiac problems, hypertension, gastroesophageal reflux disease, low back pain, joint pain, arthritis, nervousness, anxiety, and sleep apnea. Dr. Camposano's records also note that Mr. Szada had a history of lumbar laminectomy and discectomy at L5-L6. According to the history Mr. Szada later provided in connection with treatment for his work-related injury, that surgery took place in 1975.

Dr. Camposano referred Mr. Szada to a pulmonary specialist, Dr. Richard England. Dr. England's handwritten treatment notes from April 4, 1997 to November 27, 2001, may be found in CX 14. Initially, Dr. England treated Mr. Szada for pneumonia and active tuberculosis. He also diagnosed chronic obstructive pulmonary disease (COPD). CX 14. Dr. Camposano also referred Mr. Szada to Dr. Paul Jones in April 1997 because of chronic sore throat and difficulty swallowing. Dr. Jones performed a fiberoptic laryngoscopy which revealed an ulcer on his epiglottis, followed by microdirect laryngoscopy and biopsy. A report dated April 4, 1997, from Dr. England, contained in Dr. Jones' file, indicates that Mr. Szada was suffering from bilateral pneumonia at the time. CT of the chest disclosed diffuse pulmonary interstitial disease and pulmonary nodules. EX 12. A February 1998 chest x-ray for Dr. Camposano revealed bullous disease and scarring in both upper lobes of Mr. Szada's lungs. CX 24.

Dr. Camposano's records also indicate that Mr. Szada has suffered from recurrent abscesses since at least 1997. Records from Bay Area Surgical Associates reflect multiple surgeries for this problem, in October 1997, August, October and November 1998, January and March 1999, and February 2001. EX 8. Mr. Szada was referred to Dr. Jose Prieto in January 1999 due to his recurrent abscesses. Dr. Prieto saw him in February, March and April 1999 for follow up. Tests ruled out acquired immunodeficiency, and he was treated with antibiotics. EX 5.

Mr. Szada had a heart attack and underwent cardiac catheterization on September 17,

1997. He also underwent surgery for deep vein thrombosis in his left arm. He has been under the care of Bay Area Cardiology Associates, primarily Dr. Stephen Mester, since November 1997. He had coronary artery bypass surgery in January 1998. After experiencing chest pain, he had another cardiac catheterization and angioplasty on October 30, 1998. Diagnoses included atherosclerotic heart disease, ischemic cardiomyopathy and hypertension. Since then Mr. Szada has visited Dr. Mester every few months, and the record contains results of several echocardiograms and stress tests. CX 16, EX 8, EX 13. Mr. Szada was referred for evaluation to Dr. Keith Kapatkin, an internist specializing in hypertension nephrology, in May 1999. Dr. Kapatkin recommended a total change in his anti-hypertensive regimen. In July 1999, Dr. Kapatkin requested a nuclear renal scan. At Mr. Szada's last documented visit to Dr. Kapatkin, his hypertension was under control. EX 6.

After his injury on June 5, 1999, Mr. Szada was first referred to COMBI (Comprehensive Occupational Medicine for Business & Injury). According to the treatment notes, the injury occurred on a Friday, and he reported for work on Saturday and Sunday, but was unable to perform his regular duties due to back pain, which was localized to the low back, with no pain radiating to lower extremities. He reported having had lumbar surgery in 1975, with relatively little difficulty with his back since. The assessment was acute lumbar sprain. The treatment plan included medication; modified duty consisting of sedentary work with no climbing, lifting, pulling, or lifting more than 15-20 pounds, and allowing frequent position changes; home exercise; moist heat; and consider physical therapy if there was no improvement at the follow-up appointment set for June 16. EX 9.

The COMBI treatment note for June 16 indicated that Mr. Szada was having much less back pain than the prior visit, worse with activity, lessened with position changes and sitting, and still no radicular symptoms. The nurse practitioner who performed the examination discussed his current job duties and the duties of sample tower operator, and said he could do the duties of sample tower operator as he described them. The nurse recommended continued conservative treatment and restricted duty for another week. EX 9.

At his follow-up assessment on June 23, Mr. Szada indicated on the form he filled out that his pain was less than the last visit, but he was not sleeping well due to pain. He also said he had numbness and tingling in his back and legs. He was working alternate duty. The examiner noted that he was having dull achy pain, but no radicular pain. There was palpable spasm. The diagnosis, again by a nurse practitioner, was lumbosacral sprain, chronic low back pain. He recommended that Mr. Szada could return to light work with a 20 pound maximum lifting restriction, with frequent lifting and carrying of objects weighing up to 10 pounds. EX 9.

Mr. Szada filled out the follow-up assessment form similarly on June 30, July 7, and August 6, but added that he was feeling numbness or tingling in his arms as well as his legs, and indicated that his pain was about the same as the last visits. Treatment with medication was continued. The June 30 return to work recommendations continued at light work, and added restrictions to stand/walk, sit, drive, repetitive hand movements, bending, squatting and climbing.

On the July 7 form Mr. Szada asked why it wasn't getting better. The return to work restrictions did not specify limitations but stated, "Patient may need job duty changes." On the August 6 form Mr. Szada said he needed something done to get better, and for the first time his clinic notes were signed by a doctor, who ordered x-ray of his low back, and changed his medication from Ultram to Tylenol with codeine. Her notes indicate that he complained of warm sensation to his pelvic area, numbness making it difficult to go to the bathroom, warm tingling feeling down the left arm intermittently, and weakness when walking. Her return to work recommendation once again said light work with no additional restrictions. EX 9.

Mr. Szada underwent abdominal aortogram with bilateral lower extremity runoff due to severe bilateral lower extremity discomfort on August 3, 1999. There was no significant atherosclerotic vascular disease in major vessels, but evidence of slow flow and possible diabetic angiopathy in the small vessels of both legs. The doctor conducting the catheterization recommended treatment with medication. A tilt table test was also administered on August 5, 1999, due to recurrent dizziness; it was negative. CX 16, EX 13.

Mr. Szada first saw his orthopedist, Dr. Antonio Castellvi, on October 12, 1999. Mr. Szada completed a questionnaire indicating he was having upper and lower back pain, and pain in both arms and legs. He also reported difficulty controlling bladder functions. Dr. Castellvi took a history and conducted an examination, diagnosing fasciitis and lumbar strain. He ordered an MRI of the thoracic and lumbar spine which were available at the first follow-up visit on October 26, 1999. MRI of the lumbar spine revealed postsurgical changes at the L4-5 level with some lumbar neural foraminal narrowing which Dr. Castellvi believed to be due to osteoarthritis. Dr. Castellvi characterized Mr. Szada's condition as L4-5 severe degenerative joint disease and planned to try medication and physical therapy. He also discussed fusion at L4-5. MRI of the thoracic spine showed scoliosis but no canal stenosis or disc herniation. A "Workers Compensation Patient Report" showed restrictions on lifting (20 pounds), squatting, overhead reaching, repetitive use of the lower and upper extremities, stooping, crawling, standing, walking, bending, and climbing.[3] EX 10.

Dr. Castellvi referred Mr. Szada to HealthSouth Sports Medicine and Rehabilitation Center for physical therapy. He completed all prescribed units of therapy. His attitude was

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[3]There are copies of 14 Workers Compensation Patient Reports covering the period from October 12, 1999, to April 23, 2002, in EX 10. The quality of the copies makes many very hard to read. There are better copies of the forms in Exhibit A to Dr. Castellvi's deposition, CX 2. As far as I can determine, all of the reports indicate exactly the same restrictions except for the reports dated September 6, 2000, EX 10 at 42, marked "Resume Regular Job" at Mr. Szada's request, and December 12, 2000, EX 10 at 45, marked "VOID NO FILMS." Dr. Castellvi confirmed at his deposition that all of the forms were filled out the same, except that a new form was in use in his office for more recent reports which added the category "sedentary only," a restriction which was marked accidently but not meant to be applied to Mr. Szada. Dep. at 26-27.

described as "compliant." Records for his physical therapy covering the period from November 8 to December 3, 1999, are found at CX 19 and EX 11.

Dr. Castellvi next saw Mr. Szada on January 11, 2000. His condition was worse. His gait, normal before, was antalgic on this visit. Mr. Szada decided to have back surgery. EX 10.

Mr. Szada's last documented visit to COMBI was on February 17, 2000. On the follow-up assessment form, he reported that his pain was worse than the last visit, he had numbness or tingling in his arms and legs, he was still taking Tylenol with codeine or Darvocet, physical therapy had been prescribed at Health South, and he was working alternative duty. The doctor's note indicated he had been scheduled for surgery by Dr. Castellvi on February 21, 2000, but approval had not been obtained from Travelers. He had an appointment on March 6, 2000, for a second opinion from Dr. Robert Maddalon regarding the surgery recommended by Dr. Castellvi. The diagnosis was chronic back pain, and he was referred for follow-up care with an orthopedic specialist. The return to work recommendation was for light work. EX 9.

Dr. Maddalon's report appears at CX 15. Dr. Maddalon took a history, reviewed the thoracic and lumbar MRI's and conducted a physical examination. His impression was L4-L5 degenerative joint disease, and left L4-L5 foramen narrowing. He recommended a series of epidural steroid injections before surgery to see if Mr. Szada's symptoms would improve.

At a follow-up visit to Dr. Castellvi on April 20, 2000, Mr. Szada was re-scheduled for back surgery to take place in July. His condition had remained the same. EX 10.

Notes of Mr. Szada's June 15, 2000, visit to Dr. Castellvi indicate his surgery was cancelled because of his heart disease and history of pulmonary emboli, and he was referred to Dr. Stanley Dennison for a series of epidural injections. According to the plan of care, he was capable of performing light duty with no lifting over twenty pounds, must be able to change positions every hour, no overhead reaching on a regular basis, and no repeated bending, stooping, or squatting. A restriction on repetitive use for upper and lower extremities was also marked on the Workers Compensation Patient Report. EX 10.

Dr. Dennison was deposed, CX 3, but not all of his treatment records were introduced into evidence.[4] Dr. Dennison is board certified in pain management. Dep. at 3; CX 3 Exhibit A. Dr. Castellvi's file contains a consultation report from Dr. Dennison dated July 21, 2000. CX 2 Exhibit A. Dr. Dennison testified that he first evaluated Mr. Szada at that time. Dep. at 8. He took a history, reviewed medical records, and conducted a physical examination. He assessed bilateral lumbar radiculopathy, thoracic paraspinal trigger points, myofascial pain syndrome, left

[4]According to counsel for the Claimant, all of Dr. Dennison's records were produced in discovery, and counsel for the Employer/Carrier expressed an intention that they would be introduced at hearing. Dep. at 28-29. Nonetheless, they were not included on either party's exhibit index, and neither party offered them at hearing.

lumbar facet joint arthropathy, coronary artery disease and peripheral vascular disease. He recommended lumbar epidural steroid injection.

Dr. Castellvi next saw Mr. Szada in follow-up on August 15, 2000. His condition had improved after an epidural injection. His gait was normal. He was still taking Darvocet. His work restrictions remained the same. EX 10.

On September 6, 2000, Dr. Castellvi again reported that Mr. Szada's condition had improved, having had a second epidural injection. Mr. Szada requested to return to work full duty, stating a new job was becoming available. He was declared capable of returning to unrestricted activity on September 11, 2000, and scheduled for follow-up in two months. EX 10.

Mr. Szada returned to Dr. Castellvi on September 12, however, because his condition was worse. He reported going up some stairs at work, having pain in his back and both legs. He said he could not work full duty as he had requested, and wanted to work light duty. Dr. Castellvi reimposed the same light duty restrictions as before. EX 10.

Dr. Castellvi saw Mr. Szada again on November 15, 2000, and described his condition as being the same. Mr. Szada had had three injections from Dr. Dennison, and was due a fourth the following day. He complained of upper back and lower back pain, and stated that workers' compensation was not covering his upper back. Dr. Castellvi repeated the same work restrictions as before. EX 10.

In response to an inquiry from Claimant's counsel (contained in CX 2 Exhibit A) whether Mr. Szada's thoracic pain and treatment were related to the work injury, on November 28, 2000, Dr. Castellvi signed a statement that Mr. Szada had "no objective evidence [with] me of a permanent thoracic injury other than muscle strain." EX 10 at 23. In response to a request for clarification from counsel for the Employer/Carrier (also contained in CX 2 Exhibit A) on December 12, 2000, Dr. Castellvi signed a further statement that "Mr. Szada's mid back injury is solely the result of the work related injury in June, 1999," adding at the bottom, "I don't know what else could have caused it." EX 10 at 24. Dr. Dennison signed a statement that Mr. Szada's mid-back injury was solely the result of the work-related injury. CX 3 Exhibit H. According to counsel for the Claimant, those statements were prepared by his office in the context of a previous dispute by the Employer/Carrier whether treatment of thoracic pain was properly included in the claim. CX 3 at 54-55.

An MRI of Mr. Szada's cervical spine was taken on December 15, 2000 at the request of Dr. DiGeronimo. The impression was multilevel disc osteophyte protrusions and spondylitic changes narrowing neural foramina bilaterally. CX 22. There are no other records from Dr. DiGeronimo in the record. In July 2001, Mr. Szada's individual insurer, AvMed Health Plan, notified him that it had denied payment for Dr. DiGeronimo's services because the plan did not cover workers' compensation related services. CX 23.

Mr. Szada visited his cardiologist on January 29, 2001. Treatment records noted a recent hospitalization for pneumonia and a diagnosis of sleep apnea, for which C-PAP was prescribed. CX 16, EX 13.

Dr. Castellvi next saw Mr. Szada on March 9, 2001, by which time his condition had become worse. Mr. Szada reported having been given Vicodin by Dr. Dennison, which he had not yet started taking. He said a March 1 thoracic epidural had helped. Dr. Castellvi again repeated that he was limited to the same restricted range of light work. The Workers Compensation Patient Report for this and later visits was erroneously marked for the new category, "sedentary only." EX 10.

Mr. Szada was referred again to Dr. Jones for surgery on a swollen submandibular gland and nodule in April 2001, but surgery was cancelled because he could not be cleared by the cardiologist. EX 12.

Mr. Szada returned to Dr. Castellvi on May 15, 2001. Dr. Castellvi said his condition was the same. His low back pain was unchanged. He complained of left arm burning. He had been to a neurologist for a sleep study, and had a cervical MRI which he brought to Dr. Castellvi for review. Dr. Castellvi said it revealed multilevel disc osteophyte protrusions and spondylitic changes narrowing neural foramina bilaterally. He diagnosed cervical spondylosis without myelopathy. There was no change in Mr. Szada's work restrictions.

After a visit to his cardiologist on May 21, 2001, Dr. Mester observed that Mr. Szada had an abnormal nuclear study but recommended further medical treatment as he was a poor candidate for further intervention due to his severe COPD. CX 16, EX 13.

Dr. Castellvi saw Mr. Szada again on November 16, 2001, stating his condition had become worse. He had had a flare-up of pain, and he had intermittent numbness in his left hand. He reported having injections in his neck and upper back the previous day. Again the work restrictions remained unchanged. EX 10.

When Mr. Szada saw Dr. Mester on November 19, 2001, he reported worsening dyspnea on exertion and recurrent respiratory infections. His heart disease was stable with no evidence of angina or congestive heart failure. Dr. Mester said his severe chronic obstructive pulmonary disease was his predominant limiting factor. EX 13.

Mr. Szada's attorney referred him to Dr. Stephen Yavelow for a hearing evaluation in January 2002. Dr. Yavelow reported to Dr. Camposano that his examination was significant for mild to moderately severe sensorineural hearing loss bilaterally and recommended binaural amplification. CX 20, CX 21, EX 7, EX 14.

Mr. Szada was referred to Dr. George Sidhom for a consultation on his complaints of pain, including neck and shoulder pain, mid back pain, and lower back and bilateral leg pain. Dr.

Sidhom took a history and conducted an examination. His diagnostic impression was chronic neck and bilateral shoulder pain, multilevel cervical disk and osteophyte disease with severe [illegible abbreviation] and foraminal stenosis from C2/3 to C6/7. Dr. Sidhom's recommended treatment was largely illegible but appears to have been aimed at the cervical pain. EX 15.

By a March 5, 2002, visit to his cardiologist, Mr. Szada was again experiencing chest pain, but also had an exacerbation of his COPD. Dr. Mester recommended cardiac catheterization when his respiratory infection cleared. Catheterization and stenting took place on March 18, 2002. CX 16, EX 13.

At Mr. Szada's March 27, April 17, and April 24, 2002, visits to Dr. Dennison, he recommended additional lumbar and thoracic epidural injections, which were administered on April 25 and May 2, 2002. His diagnoses were bilateral thoracic radiculopathy, bilateral lumbar radiculopathy, thoracic paraspinal trigger points, myofascial pain syndrome, coronary artery disease, peripheral vascular disease, sleep apnea, C3-4, C4-5 herniated nucleus pulposis, bilateral cervical radiculopathy and insomnia. At follow-up on May 8, 2002, Dr. Dennison recommended physical therapy, and on May 22, 2002, medication and a functional capacity evaluation, and wrote a prescription that Mr. Szada was to be off work until July 1, 2002. CX 3 Exhibit G.

The diagnoses contained in Dr. Camposano's most recent treatment notes dated April 17, 2002, were cervical radiculopathy, COPD, and CAD (coronary artery disease). CX 24.

On May 20, 2002, Dr. England, Mr. Szada's pulmonologist, prepared a letter stating that in addition to his history of emphysema, Mr. Szada was also exposed to significant hazards at work, including fertilizer chemicals, PCB, diesel fumes and ammonia, without proper protection. Dr. England said he suffered from occupational lung disease and asthma, along with emphysema. Pulmonary function testing the previous year showed a moderately severe obstructive defect with significant reversibility. Dr. England noted that Mr. Szada also suffered from severe obstructive sleep apnea, and said he was totally disabled from work. The 2001 pulmonary function test report noted a significant decline in Mr. Szada's performance since his previous test in 1999.

The last reported visit to Dr. Castellvi in the record occurred on April 23, 2002. Again Dr. Castellvi said his condition was worse. Thoracic and lumbar spine x-rays showed degenerative disc changes. Diagnoses were lumbar or lumbosacral intervertebral disc degeneration, and spinal stenosis, lumbar region. Work restrictions were unchanged. As to disposition, Dr. Castellvi stated:

> The patient is unchanged and will continue with the same. The patient has had neck and low back pain since initial visit. He is not a surgical candidate due to medical status. He will continue with pain management.

EX 10 at 33.

Dr. Robert Martinez, a neurologist, examined Mr. Szada on March 20, 2002, at the request of Claimant's counsel, and was deposed on May 13, 2002. CX 4. Dr. Martinez is board certified in psychiatry and neurology, and specializes in treatment of spinal problems. Dep. at 5. According to his report, attached to the deposition as Exhibit B, Mr. Szada told Dr. Martinez he had been hurting in the cervical area ever since the injury, as well has having mid and low back pain. Dr. Martinez reviewed Mr. Szada's medical records, took a history and conducted an examination. He diagnosed chronic cervical, thoracic and lumbosacral strain with palpable fibromyositis, insomnia secondary to pain, degenerative arthritis of his spine, post-surgical changes at L4-5 with neural foraminal narrowing at L4-5 due to degenerative osteoarthritis, degenerative changes in the thoracic spine, and multiple level cervical osteophyte protrusion, spondylitic changes and narrowing of the neural foramen at multiple levels the cervical spine. He recommended follow-up with Dr. Castellvi and Dr. Dennison. He also recommended exercise, a TENS unit for pain control and physical therapy, and assigned restrictions of no jumping or bouncing exercises, not to lift greater than 20 pounds from a bent position, 10 pounds repetitively, no climbing, no bending and no stooping. In his opinion, the cervical spine injury was part of the original injury June 5, 1999, along with the thoracic and lumbar injuries. He believed Mr. Szada had reached maximum medical improvement, and assessed his permanent injury to be a 23% permanent impairment to the body as a whole.

At his deposition, Dr. Martinez testified that he believed that Mr. Szada was unable to work based on his spinal problems only. Dep. at 8. He said his clinical findings were consistent with the findings on the cervical MRI taken December 15, 2000. Dep. at 9. His opinion that Mr. Szada's cervical condition was caused by the work injury was based on his history. Dep. at 10, 39-40. He agreed that Mr. Szada's early complaints of pain in his upper back or between his shoulders, and references to radicular symptoms in his upper extremities, could have been referring to problems in his cervical area. Dep. at 11-13, 14-16, 48-50. He also agreed that to causally connect an event with an injury, he would expect problems to arise "within a couple of days or a couple of weeks"; he went on to say, "the more remote the symptoms from the date of the injury, of course, it gets harder and harder to try to relate the two." Dep. at 40. Dr. Martinez believed that Mr. Szada's lumbar and cervical problems were both significant, and that MRI scans were done first on the lower back because he initially complained worse about the low back. Dep. at 17. Dr. Martinez agreed with the restrictions assessed by Dr. Castellvi, including a restriction on repetitive use of upper and lower extremities. Dep. at 18-19. He did not believe that Mr. Szada could perform either type of job identified by Mr. Edleston. Dep. at 19-20.

The Employer/Carrier referred Mr. Szada to Dr. James Patterson, a physiatrist, for evaluation on April 30, 2002. Dr. Patterson took a history and conducted a medical examination, and reviewed a lumbosacral spine x-ray and cervical, thoracic and lumbosacral MRI's, and medical records relating to Mr. Szada's claim. Dr. Patterson's impressions were chronic low back pain syndrome, chronic thoracic pain syndrome, chronic neck pain syndrome, status post thoracic and lumbosacral strain, osteoarthritis, coronary artery disease with coronary artery bypass grafting, COPD, and deep vein thrombosis with history of pulmonary embolus. Dr. Patterson concluded that Mr. Szada's ongoing low to mid back pain was directly related to his industrial

injury, but the neck pain did not appear to be related to the injury, based on the notes following the accident, and Dr. Castellvi's report dated October 12, 1999, which did not mention neck pain. He said Mr. Szada remained capable of limited duty with

> no heavy lifting greater than 20 pounds and avoidance of activities such as stooping, crawling, bending frequently or other activities, including overhead activities. I would agree with that and would agree with Dr. Castellvi's opinion regarding that.

EX 16 at 9. He went on to state that Mr. Szada's limitations in activity were due to a combination of his underlying medical problems and his back pain, but his most significant limitations did not come from his accident. He found no clear indications for surgery, and recommended a home exercise program. He agreed that Mr. Szada had achieved maximum medical improvement, assigning an impairment rating of 8% of the whole body, with 5 % for exacerbation of his prior lumbar disc problem, and 3% for thoracic strain with a myofascial component. He said he would avoid frequent use of steroids given Mr. Szada's multiple other medical problems, and recommended conservative treatment, limiting medications to as few as possible. EX 16.

Dr. Castellvi was deposed on May 23, 2002. CX 2, EX 17. Dr. Castellvi is board-certified in orthopedic medicine. Asked about Mr. Szada's initial complaints, Dr. Castellvi said that he did not specifically note any complaints in the cervical area, but said that some patients refer to the back of their neck as the upper back. Dep. at 6, 23. Dr. Castellvi had last seen Mr. Szada on April 23, 2002, and did not anticipate seeing him again, but thought he would remain in Dr. Dennison's care. Dep. at 12. The set of Dr. Castellvi's records found as Exhibit A to his deposition contain a letter dated May 8, 2001, from Sue Chaffman, a vocational rehabilitation counselor retained by the Employer/Carrier, asking Dr. Castellvi to review and sign approval of several jobs for Mr. Szada. The letter has been marked to signify that Mr. Szada could perform four of those jobs. Dr. Castellvi denied having signed his approval of any job descriptions, which he does not do; he only gives limitations.[5] He said his staff signed off on the jobs "trying to calm some adjustor down." He only wrote "see attached W/C slip" and "needs occupational eval." on the letter.[6] Dep. at 15. Dr. Castellvi agreed that based on Mr. Szada's back, he can do light duty, but said that taking the entirety of his medical problems into account, he cannot work. Dep. at 16. He agreed he did not address any cervical problems while treating Mr. Szada. Dep. at 17.

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[5]Dr. Castellvi wrote a similar comment in response to a letter from the case manager for the carrier when she inquired whether Mr. Szada could perform his prior job after Dr. Castellvi issued the release to full duty in September 2000. *See* CX 2 Exhibit A.

[6]According to a letter to Dr. Dennison from Sue Chaffman, dated September 18, 2001, the functional capacities evaluation recommended by Dr. Castellvi was never performed because Mr. Szada's cardiologist would not give him clearance to attend. CX 3 Exhibit B. *See also* Deposition of Cheryl Becnel, Senior Claims Examiner for Travelers, taken April 5, 2002, CX 9 at 33-35.

He had not seen the cervical MRI taken at the direction of Dr. DiGeronimo, and would not comment on it. Dep. at 21-22. Nor would he comment on whether Mr. Szada's cervical condition was related to the work injury, because he had not treated Mr. Szada's neck. Dep. at 23, 26. He agreed that the worst condition at the beginning was Mr. Szada's lower back, where he initially recommended fusion surgery. Dep. at 23-24. The transcript contains the following exchange regarding the release to work form dated April 23, 2002:

> Q[uestion] And the restricted work, the first thing marked off is sedentary only; is that right?
>
> A [nswer] Yes, sir.
>
> Q. Is that a restriction you put on him?
>
> A. Yes, sir. [7]
>
> Q. And one of the things that's marked is repetitive use.
>
> A. Correct, no repetitive use of both upper or lower extremities, no repeated bending, stooping or squatting, no prolonged sitting, standing or walking.

Dep. at 25. Dr. Castellvi declined to comment on whether Mr. Szada could do any particular job. Ibid.

Dr. Dennison was deposed on June 5, 2002. CX 3. He deferred all work restrictions and limitations to Dr. Castellvi. Dep. at 11. Dr. Dennison testified that he believed Mr. Szada's cervical condition was related to the work injury. Dep. at 21. He said he suggested a functional capacity evaluation at his most recent examination on May 22 because Mr. Szada had asked to be put off work. Dep. at 23. He did not know whether Dr. Castellvi had recommended a functional capacity evaluation. Dep. at 25. He did have a copy of Dr. Castellvi's April 23, 2002, Workers Compensation Report listing the restrictions assessed by Dr. Castellvi. Dep. at 30. He confirmed that Mr. Szada did not complain about neck pain at the time of his first visit in July 2000. Dep. at 34-35. He did complain of upper back pain, but not radicular pain. Dr. Dennison said there could be a relation as the upper back is upper thoracic, near the cervical. Dep. at 18. He said Mr. Szada first complained to him of upper back pain radiating to his arms on December 11, 2000. Dep. at 43. The impressions of the December 15, 2000, MRI report were consistent with his clinical findings. Dep. at 15. He based his opinion that the cervical problem was related to the work injury on Mr. Szada's complaint. Tr. at 46. He addressed it "as a thoracic cervical situation, if there was an overlap." Dep. at 48.

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[7]Dr. Castellvi later testified to the effect that the sedentary category was marked in error, and that Mr. Szada was limited to light duty with specific restrictions as marked. Dep. at 27.

Dr. Patterson was deposed on June 10, 2002. EX 18. Asked about his opinion whether Mr. Szada's cervical complaints were related to the June 5, 1999, injury, Dr. Patterson said he "found no clear evidence in the records to allow [him] to associate the neck problems with the injury." Dep. at 7. He went on to explain that if the neck were injured in association with the accident, one would expect Mr. Szada to complain within the first week or two, and that the lack of documentation in the records did not allow him to draw the causal relationship. Dep. at 8. He said as a rule, the orthopedist would treat "whatever the patient was complaining of." Dep. at 9. He said the restrictions he endorsed in his report would encompass any restrictions on Mr. Szada for his lumbar, thoracic and cervical spine. Tr. at 10-11. Dr. Patterson would not have any additional restrictions with respect to Mr. Szada's upper extremities. Tr. at 14. Asked to review the restrictions imposed by Dr. Castellvi, Dr. Patterson said that they were the same restrictions as he had assessed, characterizing them as general kinds of statements. As to the restrictions on repetitive use, he said it would be possible to find a job that has repetitive use that would be acceptable. He had not been asked to look at any job descriptions. Dep. at 17-18, 38-42. Dr. Patterson had not been provided Mr. Szada's cardiac and pulmonary treatment records, but said it was conceivable that Mr. Szada is disabled from the standpoint of his heart and lungs, but not his back. Dep. at 19-20. He acknowledged that Mr. Szada's records reflected that he complained of pain in his arms; he said that there could be multiple factors causing arm pain, including cardiac, pulmonary, thoracic or cervical. Dep. at 25. He said Dr. Maddalon's report was written almost a year after the injury, and was too remote in time to be significant in establishing a causal relationship. Dep. at 26. Similarly, the report from Gene Rhodes dated October 11, 2000, more than a year after the injury, describing what Mr. Szada told Mr. Rhodes about the accident at the time, was "insignificant" with respect to causal relationship. Dep. at 29.

Injury Arising Out of Employment

Section 20(a) of the LHWCA, 33 U.S.C. § 920(a), provides a presumption that a claim comes within the provisions of the Act "in the absence of substantial evidence to the contrary." To establish a prima facie claim for compensation, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. 33 U.S.C. § 920(a); *Hunter*, 227 F.3d at 287.

There is a split among the Circuit Courts of Appeals as to the level of proof an employer must meet to rebut the presumption. In the Eleventh Circuit, where this case arises, the employer must "rule out" the causal connection between the accident and the condition causing disability. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990). *Compare Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (" ... the evidentiary standard ... is the *minimal* requirement that an employer submit only 'substantial evidence to the contrary.'"). If the presumption is rebutted, it no longer controls and the record as a whole must

be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994). In this case, my conclusion would be the same regardless of which standard for rebuttal of the presumption is applied.

Mr. Szada alleges that he suffered a work-related injury to his lumbar, thoracic and cervical spine. In this proceeding, the Employer/Carrier has challenged only whether Mr. Szada's cervical condition is related to the work injury. *See* Deposition of Cheryl Becnel, Senior Claims Examiner for Travelers, taken June 4, 2002, CX 10. There can be no doubt that the Claimant has established a prima facie case that his cervical condition could have been caused by the June 5, 1999, incident, based on the opinions of Dr. Martinez and Dr. Dennison.

IMC introduced the testimony of Dr. Patterson to establish that Mr. Szada's cervical problems were not related to the work injury. Dr. Patterson stated that he found "no clear evidence" to associate Mr. Szada's neck problems with his work injury. This statement does not meet the Eleventh Circuit standard of ruling out a causal connection, although it probably does meet the Fifth Circuit's standard for substantial evidence. Even if the presumption were rebutted, however, based on the evidence as a whole, I conclude that Mr. Szada has established that his cervical condition is related to his work injury. Dr. Castellvi declined to comment on Mr. Szada's cervical condition because he had not treated him for it. Nonetheless, Mr. Szada complained to COMBI of numbness and tingling in his arms as well as his legs by June 30, 1999, and indicated he was having pain in his arms and legs at his first visit to Dr. Castellvi. Other evidence the Employer/Carrier introduced to show that the injury was initially diagnosed as a lumbar strain, including its Log and Summary of Occupational Injuries and Illnesses maintained for the Occupational Safety and Health Administration, EX 1, and the Employer's First Report of Injury or Occupational Illness filed with the OWCP, EX 3, support the Claimant's position, because they show that the more severe consequences of the incident, including radicular symptoms to his legs which led to Dr. Castellvi's recommendation of fusion surgery, were not recognized at first. Drs. Martinez' and Dennison's opinions that the cervical condition is related to the injury is well-supported by the record as a whole.

Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 CFR §§ 702.401, 702.402. In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. 33 U.S.C. § 907(b); *see* 20 CFR § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. They do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989). On the other hand, where a claimant sought authorization for a single medical procedure which the employer denied, the judge does have the authority to determine the reasonableness and necessity of the procedure and issue an order directing the employer to pay for it. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

In this case, the Employer/Carrier has maintained that the cervical injury was not work-related and declined to pay medical expenses. Although the Claimant's pre-trial statement asserted that there were outstanding bills, they were not introduced into the record. I find that the diagnostic MRI and recommended treatment for his cervical injury documented in the record is reasonable and necessary. The Employer should pay for the medical treatment already incurred, as well as for future treatment of Mr. Szada's work-related cervical injury. Interest shall be assessed on all overdue medical expenses. *See Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75, 79-80 (1997).

Extent of Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). In this case, the parties have accepted Dr. Castellvi's opinion that Mr. Szada reached MMI on June 15, 2000.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038

(5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). IMC has conceded that Mr. Szada has restrictions to light duty as a result of the injury to his back and that it has no jobs he can perform. Stipulations ¶ 17; *see also* Deposition of John Hammond, Manager of Human Resources for IMC, CX 5; Deposition of Constance Nethercutt, Workers' Compensation Administrator for IMC, CX 6; Deposition of Louise Dandridge, Manager of Health Services for IMC, CX 7; Deposition of Richard Luke, Operations Supervisor for IMC, CX 8. Thus Mr. Szada has established a prima facie case of total disability.

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*,841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). The claimant may still establish total disability, however, if he establishes that he diligently tried and was unable to secure such employment. *Palombo*, 937 F.2d at 73; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986).

IMC retained a vocational expert, Jim Edleston, to evaluate whether there was suitable alternate employment for Mr. Szada. Mr. Edleston's report and resume are found at EX 4.[8] He was deposed on May 29, 2002, CX 25, and also testified at hearing. Mr. Edleston has a B.A. in Sociology and is a Certified Rehabilitation Counselor and a licensed Florida Worker's Compensation Provider. His resume reflects over 20 years' experience in disability management, vocational rehabilitation and counseling and ergonomic consulting. According to his report, his goal was to assist in determining Mr. Szada's employability. He interviewed Mr. Szada over the telephone. He noted physical restrictions assessed by Dr. Castevill; an 8th-grade education; employment history with IMC; a Florida drivers license; history of an adult felony conviction with rights restored; and current income from workers' compensation benefits and Social Security disability benefits. In a labor market survey conducted on April 24, 2002, he identified two potential employers: Spherion, with six openings for assemblers on the 3 pm to 11 pm shift at

[8]Although page numbers in EX 4 suggest that the exhibit contains 16 pages, pages 3-15 were withdrawn at hearing as the Employer had failed to provide copies to the Claimant in advance of the hearing. Tr. at 123-125.

$6.25 per hour (entry level), described as "90% sedentary cutting small cables and attaching connectors"; and Milroy Optical Co., with two or more openings for lens polisher/assembler at $7.00 per hour, described as "Assembly of Eye Glasses or Polishing of Lenses; very clean environment."

In his testimony at the hearing, Mr. Edleston confirmed his qualifications and work experience set forth in his resume, having obtained certification from the State of Florida in 1983, and maintaining a state license since they were first required about six or seven years before the hearing. Tr. at 106-108. He is not certified as a vocational evaluator to perform any tests. Tr. at 110. Nor does he have a master's degree, which is available in the field of vocational rehabilitation. Tr. at 111-112. In performing his evaluation of Mr. Szada, he used the Internet to generate a list of employers, whom he then called. He did not retain the lists of employers who did not have work appropriate for Mr. Szada. Tr. at 112. Counsel for the Claimant moved to exclude his testimony because of his failure to retain all of the data. Tr. at 114; *see* Claimant's motion, the Employer's response, and my order denying the motion dated July 25, 2003.

Mr. Edleston agreed that in seeking alternative work, his understanding of Mr. Szada's medical restrictions was that Mr. Szada had been released to return to sedentary work. Tr. at 126. He recalled that a box had been checked for a restriction against repetitive use, but it did not specify upper or lower extremities. Tr. at 127. He did not understand that Mr. Szada was restricted from repetitive use of his upper extremities. Tr. at 134. The jobs he identified were entry level positions within the physical restrictions as he understood them, and requiring minimal training. Tr. at 131. He also relied on representations from the persons he contacted about other physical requirements, such as occasional lifting. For example, the representative he spoke to at Spherion told him that the job of assembler entailed no lifting over 5 pounds, but a different representative of Spherion testified at a deposition, CX 18, that the job required lifting up to 50 pounds. *See* Tr. at 135-144. On cross examination, Mr. Edleston confirmed that all three jobs he identified (assembler, eye glass assembly and lens polisher) require repetitive use of the upper extremity. Tr. at 151-152. He also confirmed that if one of Mr. Szada's restrictions was no repetitive use of the upper extremities, then all three jobs are beyond his restrictions. Tr. at 154.

Claimant's counsel referred him to Ricardo Estrada for a vocational evaluation to counter the Employer/Carrier's vocational evidence. Mr. Estrada's report dated April 4, 2002, appears at CX 12, and his deposition at CX 1. Mr. Estrada has been a certified rehabilitation counselor since 1985, a certified vocational evaluator since 1986, and a licensed rehabilitation professional in the State of Florida since 1985. Dep. at 104. Mr. Estrada met with Mr. Szada, took social, work and medical histories, performed a transferable skills analysis, and administered tests. In his report, Mr. Estrada said Mr. Szada put forth good effort. He shifted position on his seat and was given frequent breaks to alternate position. At the conclusion of the pencil and paper and manual dexterity tests his hands were red and swollen. Mr. Estrada reported that Mr. Szada did not perform well on the Purdue Pegboard test administered to assess his fine manual and finger dexterity. Mr. Estrada concluded that Mr. Szada was unable to work based on his transferable skills, medical status and functional limitations. Mr. Estrada reviewed a vocational report

prepared by Sue Chaffman for the Employer/Carrier, which was not introduced into the record. In response to that report, Mr. Estrada stated that Mr. Szada did not have the manual or finger dexterity, or stamina, to work as an assembler. During his deposition, Mr. Estrada also indicated he had been given two reports from Mr. Edleston to review. Dep. at 25. Mr. Estrada interpreted the restrictions imposed by Dr. Castellvi to include a limitation on repetitive use of his upper and lower extremities. Dep. at 35, 76. He confirmed his belief that there is no employment which Mr. Szada could do within his limitations. Dep. at 71-72. He also confirmed that he believed Mr. Szada to be unable to perform any assembly or assembler position, Dep. at 74-76, including the positions identified by Mr. Edleston, Dep. at 82-88, 103. He telephoned Spherion and Milroy Optical, and spoke to a different representative than Mr. Edleston had, and was given some different information. For example, he was told that the jobs through Spherion required lifting up to 40 to 50 pounds occasionally.

I find that the Employer has failed to carry its burden to establish the existence of suitable alternate employment. Dr. Castellvi testified that Mr. Szada's restrictions included no repetitive use of the upper extremities. Not surprisingly, given the inconsistencies between narratives and forms in Dr. Castellvi's formulations of Mr. Szada's restrictions, and the misleading response by his staff to Ms. Chaffman's May 8, 2001 letter suggesting that Dr. Castellvi had approved assembly jobs, Mr. Edleston misunderstood the restrictions. Mr. Edleston conceded that the jobs he identified were not suitable for someone who had such a restriction. The three jobs identified by Mr. Edleston therefore do not constitute suitable alternate work. Moreover, although Mr. Edleston opined at the hearing that there are jobs Mr. Szada can perform, Tr. at 148, he did not conduct any further survey, Tr. at 150, or identify any such jobs. Furthermore, Mr. Estrada testified that there are no jobs Mr. Szada can perform. As the Employer/Carrier has failed to establish suitable alternate employment, it follows that Mr. Szada has been permanently totally disabled since June 15, 2000, the date he reached maximum medical improvement.

Conclusion

In summary, I conclude that Mr. Szada's cervical injury arose from his employment, and that he has been permanently totally disabled since June 15, 2000.

Attorney's Fees

Fees for claimants' representatives are addressed in the Act and the regulations at 33 U.S.C. § 928 and 20 CFR §§ 702.132 – 135. The Act prohibits the charging of a fee in the absence of an approved application. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections.

ORDER

The claim for benefits filed by Thomas F. Szada, is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall pay permanent total compensation to the Claimant beginning June 15, 2000, based on an average weekly wage of $817.25, in accordance with Section 8(a) of the Act, 33 U.S.C. § 908 (a). The Employer/Carrier is entitled to a credit for amounts paid for temporary total disability since June 15, 2000.

2. The Employer/Carrier shall pay medical expenses incurred in connection with the injury to Mr. Szada's cervical spine.

3. Claimant is entitled to interest on accrued unpaid medical expenses. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

4. The District Director shall make all calculations necessary to carry out this order.

5. Employer/Carrier shall pay Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related injury to his lumbar, thoracic and cervical spine on June 5, 1999, pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a).

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant and opposing counsel, who shall have ten (10) days to file any objections.

A

Alice M. Craft
Administrative Law Judge